

7.11 CARE REQUIRED OF CHILDREN (Approved 5/91)

A. In General (7 years and Older)

A child, old enough to be capable of negligence, is required to act with the same amount of care as children of similar age, judgment and experience. In order for you to determine whether a child has acted negligently, you should take into consideration the child's age, intelligence and experience. Also you must consider the child's capacity to understand and avoid the danger to which he/she was exposed in the actual circumstances and situation in this case. You, the jury, must decide the factual question of whether this child was comparatively negligent.

B. Where Child Under 7 Years

There is a presumption in the law that a child under the age of seven years is not capable of acting negligently. You may reject this presumption only if the party who is claiming the child was negligent proves that this particular child had the experience and the capacity to avoid the danger which was present in this situation.

If you decided that this child had the capacity to act negligently then you must review the facts to see if the child failed to use that amount of care to avoid the danger which should have been exercised by children with like experience and intelligence.

Cases:

Bush v. N.J. & N.Y. Transit Co., Inc., 30 N.J. 345 (1959); *Dillard v. Fue*, 65 N.J. Super. 234 (App. Div. 1961).

NOTE TO JUDGE

Between the time in life when a person is incapable of exercising the care and judgment necessary to avoid and avert danger, and the time when such person is in law an adult, responsibility depends on matters of fact and in this transition period such person may or may not be guilty of contributory negligence.

The degree of care required of a child old enough to be capable of negligence, is such as is usually exercised by persons of similar age, judgment and experience. In order to determine whether such a child has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid the danger to which it is exposed in the actual circumstances and situation under investigation.

Nichols v. Grunstein, 105 N.J.L. 363 (E. & A. 1929); *Dillard v. Fue*, 65 N.J. Super. 234 (App. Div. 1961).

As to children under 7, New Jersey follows the rebuttable presumption rule. Thus in *Bush v. N.J. & N.Y. Transit Co.*, 30 N.J. 345 (1959), the Supreme Court held:

The question of capacity or incapacity is simply a factual inquiry, and is whether the particular child has the capacity to be contributorily negligent, *i.e.*, act unreasonably under the circumstances, in light of the age, training, judgment and other relevant factors applying to the child, and the test to be applied is that applicable to any other question of fact. The trial judge is first to view the matter and if he is of the opinion that the child, after a consideration of all relevant factors, does not have the capacity to be contributorily negligent and that reasonable men could not disagree, he then decides the question of capacity as a matter of law (emphasis added). But if the trial judge feels that reasonable men can disagree on the question of incapacity even though he himself would decide for or against incapacity, then he must allow the jury to decide the question of incapacity. The jury, if it finds the particular child at the time of the accident had capacity to be negligent, must then decide whether the particular child was negligent. *Id.* 354

After a consideration of the authorities we adopt the view that a child of less than seven years of age is rebuttably presumed (emphasis added) to be incapable of negligence and hence the issue may not (emphasis added) be submitted to the jury in the absence of evidence of training and experience from which the jury could infer that the child was capable of understanding and avoiding the danger of injury involved in the circumstances of the case. . . . If evidence of capacity is introduced, then the trial judge must determine if such evidence is sufficient so that reasonable men might disagree concerning the question of whether the child

had the capacity to perceive the task and avoid the danger to himself. If the answer is in the affirmative and if there is further evidence that the child did not act in a manner which would be expected of a child of similar age, judgment and experience, then the question of contributory negligence must be submitted to the jury.
Id. at 358

N.B. The trial judge must instruct the jury that there is a presumption of incapacity, that it is first to determine whether there is such evidence sufficient to overcome the presumption of incapacity and to render the child capable of being contributorily negligent, and, then, if the jury finds that the child is capable, it must determine whether the child was contributorily negligent under the facts of the particular case.

Additional factors which might be introduced to show that a child was capable of negligence whereas the average child the same age would not be, are, for example, his/her attending school, his/her being taught traffic safety regulations, his/her experience in caring for himself/herself in traffic, and any other evidence of the child's physical and mental capabilities.